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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

Number 71-1306

CATHERINE T. PENDERGRAFT,
Petitioner,

vs.

TOM D. COOK,
Superintendent of the Mississippi State Penitentiary,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

OPINIONS BELOW

The opinion sought to be reviewed is **Pendergraft v. Cook**, 5 Cir. 1971, 446 F. 2d 1222, reh. den. ... F. 2d ... (No. 71-1598, November 12, 1971). See Appendix "A".

JURISDICTIONAL STATEMENT

Respondent concedes that this Court has jurisdiction to review the decision by Writ of Certiorari by virtue of Section 2254 (1), Title 28, U. S. C.

QUESTIONS PRESENTED

I

Whether Section 1762, Mississippi Code of 1942, Annotated, Recompiled, Which Excluded Women From Jury Service in the State of Mississippi, Denied the Petitioner Her Constitutional Rights as Guaranteed Under the Fourteenth Amendment to the United States Constitution?

II

Whether the Court of Appeals for the Fifth Circuit Committed Error in Giving Prospective Application to White v. Cook, 251 F. Supp. 401 (1966)?

III

Whether Petitioner Was Denied Her Constitutional Rights to Be Secure Against Unreasonable Searches and Seizures as Provided by the Fourth Amendment to the United States Constitution?

STATUTORY PROVISIONS INVOLVED

Section 1762, Mississippi Code of 1942, Annotated, Recompiled, "Who are competent jurors."

> Every male citizen not under the age of twenty-one years, who is a qualified elector and able to read and write, has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard, is a competent juror; but no person who is or has been within twelve months the overseer of a public road or road contractor shall be competent to serve as a grand juror. But the lack of any such qualifications on the part of one or more jurors shall not vitiate an indictment or verdict. However, be it further provided that no talesman or tales juror shall be qualified who has served as such tales juror or talesman in the last preceding two years; and no juror shall serve on any jury who has served as such for the last preceding two years; and no juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that term.

STATEMENT OF THE CASE

Petitioner is a woman. She was convicted of murder in the Circuit Court of the First Judicial District of Hinds County, Mississippi. On appeal to the Mississippi Supreme Court that conviction was reversed for several reasons. She was retried, reconvicted and her conviction was affirmed by the Mississippi Supreme Court. 213 So. 2d 560. She took a direct appeal to this Court. A Motion to Affirm or Dismiss was filed by the State of Mississippi and on

April 21, 1969, this Court granted the Motion to Dismiss for want of jurisdiction, and also, treating the papers whereon the appeal was taken as a Petition for Writ of Certiorari, denied certiorari. 374 U.S. 715, 22 L. Ed. 2d 671, 89 S. Ct. 1453; reh. den., 395 U. S. 941, 23 L. Ed. 2d 459, 89 S. Ct. 1993.

Throughout these entire proceedings in the State Courts and before this Court, the unconstitutionality of the statutory exclusion of women from jury service was persistently urged by petitioner. After the dismissal of the appeal and denial of certiorari, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Jackson Division of the Southern District of Mississippi. District Judge Dan M. Russell, Jr. presided at all times that this case has been in the District Court.

On December 30, 1969 Judge Russell followed **White v. Cook**, M. D. Ala., 1966, 251 F. Supp. 401 (3-Judge), which held as unconstitutional a like exclusionary statute of Alabama and the dictum of the Court of Appeals for the Fifth Circuit in **Bass v. State**, 381 F. 2d 692.

Judge Russell allowed an interlocutory appeal to the Court of Appeals for the Fifth Circuit on the jury issue under Section 1292, Title 28, U. S. C. In view of the fact that there was also a question before the United States District with respect to the constitutionality of the search and seizure, the Court of Appeals for the Fifth Circuit declined to decide the jury question and remanded the case to the District Court.

After fully considering the admissibility of the questioned items of evidence on stipulation of counsel, on February 22, 1971 the District Court ruled that the items of evidence were obtained as a result of a reasonable search, and were admissible in evidence, but reaffirmed its earlier

decision that petitioner was entitled to be indicted and tried by juries from which women had not been excluded. The State of Mississippi, feeling aggrieved by this judgment, prosecuted an appeal to the Court of Appeals for the Fifth Circuit on the jury issue. On August 13, 1971 the United States Court of Appeals for the Fifth Circuit dismissed the Petition for Writ of Habeas Corpus and on November 12, 1971 denied a Petition for Rehearing. A copy of this Opinion is Appended, bound with this Brief, and marked as Appendix "A".

ARGUMENT

I

Whether Section 1762, Mississippi Code of 1942, Annotated, Recompiled, Which Excluded Women From Jury Service in the State of Mississippi, Denied the Petitioner Her Constitutional Rights as Guaranteed Under the Fourteenth Amendment to the United States Constitution?

II

Whether the Court of Appeals for the Fifth Circuit Committed Error in Giving Prospective Application to White v. Cook, 251 F. Supp 401 (1966)?

The above questions were first presented to the Supreme Court of Mississippi in **State v. Virginia Hall,** 187 So.2d 861 (Miss. 1966). This was an appeal to the Mississippi Supreme Court by the State of Mississippi from an Order of the Circuit Court of Lee County, Mississippi, quashing an indictment against Virginia Hall shortly after the decision of the three-judge District Court in Alabama in **White v. Cook,** supra. The Mississippi Supreme Court reversed the Circuit Court and reinstated the indictment. The case was then taken to this Court by direct appeal and the appeal was dismissed per curiam. The Chief Justice and Harlan and White, JJ, were of the opinion that the appeal should be dismissed for want of jurisdiction. Justice Douglas and Justice Fortas were of the opinion that probable jurisdiction should be noted.

The Respondent places strong reliance on **Hoyt v. Florida,** 368 U.S. 57 (1962), wherein this Court said:

> "We need not, however, accept appellant's invitation to canvass in this case the continuing validity of this Court's dictum in Strauder v. West Virginia, 100 U.S. 303, 310, 25 L. Ed. 664, 666, to the effect that a

state may constitutionally 'confine' jury duty to 'males'. This constitutional proposition has come unquestioned for more than eighty years in the decisions of this Court. See Fay v. New York, supra (332 U.S. at 289, 290) and had been reflected until 1957 in congressional policy respecting jury service in the federal courts themselves."

The pros and cons of this proposition are further discussed in **Ballard v. United States**, 329 U. S. 204, both in the majority and dissenting opinions. This case was decided prior to the Act of Congress making women eligible for jury duty in federal courts regardless of their ineligibility in certain state courts. In the majority opinion Justice Douglas made one observation for which we can all be thankful when he said,

"The truth is that the two sexes are not fungible."

In an opinion in that case by Justice Frankfurter, joined by Chief Justice Vinson and Justices Jackson and Burton, it was said that:

"Even now, this Court does not find that the exclusion of women constitutes an inroad upon the vital safeguards for a criminal trial so as to involve the denial of due process."

While Justice Burton was speaking in dissent, it is suggested that he made a correct statement when he said:

"There is no constitutional, statutory or court rule or policy requiring women to be placed on all federal jury lists. Congress might have required such a course and might have set up complete federal qualifications for federal jurors, but it never has done so. Instead, it has provided that state actions shall determine most of the qualifications for federal jury service. As a result it would be reversible error for the federal courts

> to include women on federal juries in those states which do not make women eligible for service as jurors of the highest court of law in such states."

However, subsequent to this pronouncement Congress did make women eligible in federal courts regardless of eligibility in a given state court.

Some still say the denial of certiorari or dismissal of an appeal by this Court means nothing but this belief is far from universal. Many courts in the proper type of case feel strongly to the contrary, and it is respectfully suggested that the case at bar, as well as the **Virginia Hall** case, supra, fall in that category of cases where the dismissal of appeal and denial of certiorari is of considerable import. In **Brown v. Allen**, 344 U.S. 543, this Court said:

> "Perhaps the profession could accept denial as meaningless before the custom was introduced of noting dissent from them. Lawyers and lower judges will not readily believe that justices of this court are taking the trouble to signal a meaningless division of opinion about a meaningless act."

As in the case at bar in the **Virginia Hall** case, supra, in **Brown v. Allen**, supra, there were dissents from the denial of certiorari.

As this Court knows, four justices must vote in the affirmative before the Court will grant certiorari. In **Eaton v. Price**, 360 U. S. 246, in an opinion by Justice Brennan, it was also revealed that the "rule of four" applies to appeals as well as to petitions for certiorari.

By the provisions of 28 U. S. C., Section 1257(2), appeals may be taken to this Court from the highest court of a state when there is drawn in question the validity of any state statute on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States,

and the decision is in favor of its validity. In the case at bar, and in the **Hall** case, supra, the only question before this Court was whether or not the Mississippi statute confining jury service to males is repugnant to the Constitution of the United States. There is no question but that these appeals presented what, on their face, would appear to be a substantial federal question. Where such a question as the constitutionality of a state statute is squarely presented to this Court, there must be some mandating reason for the dismissal of the appeal and the denial of certiorari. The explanation is believed found in cases such as **Simcox v. Harris**, 324 Fed. 2d 376 (1963), decided by the Court of Appeals for the Eighth Circuit. **Simcox** was a federal prisoner being held in prison at Alcatraz. He filed habeas corpus and the case was ultimately decided adversely to him by the Court of Appeals for the Ninth Circuit. Certiorari was then denied by this Court. He was transferred to a federal prison in Missouri and went the same route on the same question through the District Court in Missouri and the Court of Appeals for the Eighth Circuit. As that Court said:

> "Application for certiorari was made to the Supreme Court from the decision of the Court of Appeals of the Ninth Circuit, and the Supreme Court thus was faced directly with the question, presented to it on appellant's existing imprisonment and in the only manner that could come before the court from the lower federal courts, whether the holding of those courts, that the Kahn case had not been affected by any of the Supreme Court's subsequent decisions but still remained the law, should be permitted to stand. The Court's denial of certiorari seems to us in this situation, differently than such action on its part generally, to have a **mandating significance**, (a) because of the immediacy of the question in the particular proceeding, and (b) because of the nature of

> the consideration seemingly involved on its part from the setting out in the order denying certiorari that one of the justices was of the opinion 'that certiorari should be granted'. Simcox v. Maddigan, 370 U.S. 904, 82 S. Ct. 1593, 8 L.Ed. 2d 830." (Emphasis added.)

It is respectfully suggested that the case at bar is in the identical situation and that a mandating significance should be attached to the dismissal of appeal and denial of certiorari.

There can be no question but that the constitutionality of a state statute such as that with which we are here involved presents a substantial federal question, but as Chief Justice Warren remarked in an address before the American Law Institute in 1954, quoting from Wiener, the Supreme Court's new rules, 68 Harvard Law Review 20:

> "It is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari. As regards appeals from state courts our jurisdiction is limited to those cases which present substantial federal questions. In the absence of what we consider **substantiality in the light of prior decisions**, the appeal will be dismissed without opportunity for oral argument" (Emphasis added).

In the light of that statement by the then Chief Justice it would appear obvious that when the case at bar and the **Virginia Hall** case, supra, were presented on both appeal and petition for certiorari, the Supreme Court did not consider the question presented as a substantial one in the light of its prior decisions particularly in **Hoyt v. Florida**, supra, which reaffirmed what was said in **Strauder v. West Virginia.**

The Court of Appeals for the Fifth Circuit certainly recognized the validity of this position taken by the respondent when Judge Coleman, who delivered the majority opinion, stated:

> "This, then, brings us face to face with the unreviewed and unreversed decision of the Supreme Court of Mississippi in State v. Hall, supra, and in Mrs. Pendergraft's direct appeal, that the decision in White v. Cook, supra, was not binding on it. 187 So.2d at 863, and that there existed a reasonable basis for the legislative classification which excluded women from jury duty in Mississippi State Courts."

The Respondent would respectfully contend that these two questions have been decided with finality by the Mississippi Supreme Court, the Court of Appeals for the Fifth Circuit, and this Court.

III

Whether Petitioner Was Denied Her Constitutional Rights to Be Secure Against Unreasonable Searches and Seizures as Provided by the Fourth Amendment to the United States Constitution?

In **Pendergraft v. Cook**, 323 F. Supp. 967 (1971), a copy of this Opinion is Appended, bound with this Brief, and marked Appendix "B", the District Court stated:

> "This Court agrees with the finding of the State Supreme Court that probable cause existed for the arrest of petitioner, but this of itself does not validate the search. The cause for arrest must exist independent of the search. Upon the officers' observance of the body in rigor mortis and upon their awareness that petitioner had been at home alone with the deceased throughout the afternoon and evening, they

had probable cause for arrest. In the obvious fact that, when they arrived, efforts had been made to clean the body, traces of blood being present on the floor and nearby doorknobs, and because of the numbers of people in and out of the premises, their efforts to gather and preserve evidence were permissible. This Court agrees that the detectives would have been derelict in their duty if they had not been alert and observant in investigating a death which bore every indication of having been violently inflicted."

In **Vale v. Louisiana**, 399 U. S. 30, 26 L. Ed.2d 409, 90 S. Ct. 1969, this Court held:

"The Louisiana Supreme Court thought the search independently supportable because it involved narcotics, which are easily removed, hidden, or destroyed. It would be unreasonable, the Louisiana Court concluded, 'to require the officers under the facts of the case to first secure a search warrant before searching the premises, as time is of the essence inasmuch as the officers never know whether there is anyone on the premises to be searched who could very easily destroy the evidence.' 252 La. at 1070, 215 So.2d at 816. Such a rationale could not apply to the present case, since by their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises. But entirely apart from that point, our past decisions make clear that only in 'a few specifically established and well-delineated' situations, Katz v. United States, 389 U. S. 347, 357, 19 L. Ed.2d 576, 585, 88 S. Ct. 507, may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it. **The burden rests on the state to show the existence of such an exceptional situation.** . . ." (Emphasis added)

The United States District Court obviously recognized that the State had shown an exceptional situation when the facts revealed that the petitioner had been at home alone with the deceased throughout the afternoon and evening, and that when they arrived they noticed that efforts had been made to clean the body, and further finding traces of blood on the floor and doorknobs and that a number of people had been in and out of the premises.

Mr. Justice Black, with whom the Chief Justice joined in the dissenting opinion, stated:

> "Moreover, the circumstances here were sufficiently exceptional to justify a search, even if the search was not strictly 'incidental to an arrest.' The Court recognizes that searches to prevent the destruction or removal of evidence have long been held reasonable by this Court. Preston v. United States, supra; McDonald v. United States, 335 U.S. 451, 455, 93 L. Ed. 153, 158, 69 S. Ct. 191 (1948); Carroll v. United States, 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 ALR 790 (1925). Whether the 'exceptional circumstances' justifying such a search exist or not is a question that may be, as it is here, quite distinct from whether or not the search was incident to a valid arrest. . . ."

CONCLUSION

Respondent respectfully submits that the petition for writ of certiorari should be denied and that the judgment of the Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted

A. F. SUMMER
Attorney General

By: GUY N. ROGERS
Assistant Attorney General
P. O. Box 220
New Capitol Building
Jackson, Mississippi 39205
Attorneys for Respondent

Certificate

I, Guy N. Rogers, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to Honorable W. E. Gore, Jr., Attorney at Law, 500 First Federal Building, Jackson, Mississippi 39205.

This the .... day of June, A. D., 1972.

Guy N. Rogers
Assistant Attorney General

APPENDIX A

In the
United States Court of Appeals
For the Fifth Circuit

No. 71-1598

MRS. CATHERINE T. PENDERGRAFT,
Petitioner-Appellee,
versus

TOM D. COOK, SUPERINTENDENT,
MISSISSIPPI STATE PENITENTIARY,
Respondent-Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi

(August 13, 1971)

Before Coleman, Simpson, and Roney,
Circuit Judges.

Coleman, Circuit Judge: This case is here, on habeas corpus, for the second time. We had previously remanded it, *Pendergraft v. Cook,* 5 Cir., 1970, 433 F.2d 969.

Upon remand, the District Court held that the search and seizure involved in this case was not constitutionally invalid, *Pendergraft v. Cook,* 323 F.Supp. 967 (S.D.,

Miss., 1971). For the reasons set forth in the reported opinion of the District Court, we affirm its judgment on this issue.

The District Court reaffirmed its earlier decision (not reached on the prior appeal) that the petitioner was constitutionally entitled to be indicted and tried by juries from which women had not been totally and statutorily excluded (See 433 F.2d 970). On this issue, we reverse and direct that the petition be dismissed.

Mrs. Catherine T. Pendergraft, of Jackson, Mississippi, was convicted in the state circuit court of the murder of her husband. On issues no longer in existence, the Mississippi Supreme Court reversed the first conviction and remanded the case for a new trial, *Pendergraft v. State,* 191 So.2d 830 (Miss., 1966).

The new trial resulted in a second conviction, which was affirmed, *Pendergraft v. State,* 213 So.2d 560 (Miss., 1968). A direct appeal to the Supreme Court of the United States resulted in dismissal for want of jurisdiction and the denial of certiorari, *Pendergraft v. Mississippi,* 394 U.S. 715, 89 S.Ct. 1453, 22 L.Ed.2d 671 (1968), rehearing denied, 395 U.S. 941. Mr. Justice Douglas recorded his opinion that probable jurisdiction should be noted.

In both appeals from both convictions to the Supreme Court of Mississippi Mrs. Pendergraft urgently sought reversal because of the total exclusion of women from the grand jury which indicted her and the petit juries which had tried her, see 213 So.2d at 565. The Mississippi Supreme Court specifically declined to reverse on that ground, citing its decision in *State v. Hall,* 187 So.2d 861 (Miss., 1966).

In *Hall,* supra, the Court had held that the power to prescribe qualifications for jurors in state courts is vested in the legislature and that it had the power to make rea-

sonable classifications, such as, for the causes stated, validly included the exclusion of women.

Mr. Chief Justice Ethridge dissented on the ground that the total exclusion of women from jury service is an invalid classification, in violation of the due process and equal protection clause of the Fourteenth Amendment, as well as of § 14 of the Mississippi Constitution. The Mississippi Chief Justice pointed out that in 1966 only two states in the Union had statutes completely and absolutely excluding women from jury service, these being South Carolina and Mississippi. The Chief Justice further concluded, however, 187 So. 2d at 871, that a holding in line with his views "should be prospective only in its application".

In 1968, the Mississippi Legislature amended the jury statutes to permit women to serve on grand and petit juries, Chapter 335 Laws of Mississippi of 1968 (amending § 1762 of the Mississippi Code of 1942, Recompiled, as amended).

When the Supreme Court of the United States denied review, Mrs. Pendergraft filed her petition for the writ of habeas corpus in United States District Court. In that petition, she contended, as in the State and Federal Supreme Courts, that she had been twice tried and twice convicted of the crime of murder by a jury composed entirely of members of the male sex, that both the indictment and the convictions were thus in denial of the equal protection and due process of law, additionally contending, as stated in the outset, that her state court trial had been rendered invalid by the admission of evidence illegally seized in violation of federal constitutional rights.

The District Court twice relied upon the reasoning of a Three-Judge District Court in the Middle District of Alabama which had held unconstitutional a similar exclusionary statute of that state, *White v. Crook*, 251 F.

Supp. 401, 408 (1966). The Alabama Three-Judge Court, however, was careful to point out that its decision *should be prospective in its application* (citing cases) 251 F. Supp. at 409.

This appeal, therefore, encounters these incontrovertible facts: (1) Mrs. Pendergraft was indicted and tried by juries from which women were totally excluded by statute; (2) since 1968 Mississippi has not excluded women from jury service, and (3) there can be no currently existing justiciable controversy as to the exclusion formerly practiced, unless Mrs. Pendergraft, on collateral attack, is entitled to retrospective application of a finding of unconstitutionality.

This, then, brings us face to face with the *unreviewed* and *unreversed* decision of the Supreme Court of Mississippi in *State v. Hall, supra,* and in Mrs. Pendergraft's direct appeal, that the decision in *White v. Crook, supra,* was not binding on it, 187 So.2d at 863, and that there existed a reasonable basis for the legislative classification which excluded women from jury duty in Mississippi state courts.

We also encounter the concession of Mr. Chief Justice Ethridge and of the Alabama Three-Judge Court that any holding of unconstitutionality on this score should be entitled to *prospective application* only.

Indeed, the Fifth Circuit, in assuming, without deciding, the correctness of the decision in *White v. Crook, supra,* was of the clear view that it should not be accorded retrospective effect, *Juelich v. United States,* 5 Cir., 1968, 403 F.2d 523.

We, therefore, conclude that Mrs. Pendergraft was not entitled to habeas corpus relief in the Court below and that her petition should have been dismissed, *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601

(1965); *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1965).

The judgment of the District Court on direct appeal is reversed. On cross appeal it is affirmed. The case is remanded with directions that the petition for the writ of habeas corpus be dismissed.

SIMPSON, Circuit Judge, concurring in part and dissenting in part:

I agree with the Court that the search and seizure involved in this case did not deprive Mrs. Pendergraft of her Fourth Amendment protection against unreasonable searches and seizures. I therefore concur in affirmance of the cross-appeal. With respect to the issue raised on the direct appeal, I agree with the lower court that under well defined principles of the jurisprudence existing at the time of the petitioner-appellee-cross-appellant's indictment and trial, Mrs. Pendergraft must be reindicted by a grand jury and retried by a petit jury from each of which women have not been arbitrarily excluded. Accordingly, I would affirm upon the direct appeal taken by the respondent Superintendent of the Mississippi State Penitentiary.

The Court concedes that the statutory exclusion of all women from service on grand and petit juries solely because of their sex is violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. Because the Court takes the position that this doctrine was first enunciated in *White v. Crook,* D.C.M.D. Ala., 1966, 251 F.Supp. 401, it reasons that the grant of the writ of habeas corpus in this case is equivalent to making the holding in *White* retroactive, something which the three-judge district court in *White* expressly declined to do. It also cites the Fifth Circuit case of *Juelich v. United States,* 1968, 403 F.2d 523, in which it was held that the exclusion of women

from appellant's 1954 federal court trial did not invalidate *his* conviction.

I am not persuaded that the decision in *White v. Crook* marks the point in time at which the State of Mississippi should have been put on notice that its statutory exclusion of women from grand and petit juries violated the Fourteenth Amendment. In *Ballard v. United States*, 1946, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181, the Supreme Court reversed mail fraud convictions because women had been systematically excluded from service on federal juries in the Southern District of California. The following language from the *Ballard* opinion is worth repeating here:

> "We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the Thiel case, we should exercise our power of supervision over the administration of justice in the federal courts, McNabb v. United States, supra, to correct an error which permeated this proceeding.
>
> "It is said, however, that an all male panel drawn from the various groups within a community will be a truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not

> fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." [footnotes omitted] 329 U.S. at 193-4, 67 S.Ct. at 264.

Hoyt v. Florida, 1961, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118, arose out of the alleged murder of a man by his wife. Florida law, at the time of Mrs. Hoyt's jury trial, permitted women to serve on juries only if they voluntarily registered for such service. The United States Supreme Court upheld the conviction for second degree murder on the basis that the appellant had failed to produce any substantial evidence to show an arbitrary exclusion of women from jury service as a result of the application of the Florida statute. In concluding its opinion in *Hoyt,* however, the Court noted:

> "Finding no substantial evidence whatever in this record that Florida has arbitrarily undertaken to exclude women from jury service, a showing which it was incumbent on appellant to make . . . we must sustain the judgment of the Supreme Court of Florida." 368 U.S. 69, 82 S.Ct. at 166-7, 7 L.Ed.2d at 126.

Hoyt, unlike *Ballard* (which was a direct federal appeal), mounted an attack upon the Florida jury system upon constitutional grounds. In the course of its opinion in *Hoyt,* the Supreme Court noted that only three states excluded women from jury service and Mississippi was pointedly named as one of the three. From and after 1961, the decision date of *Hoyt,* prior to the killing in-

volved here and prior to the indictment and trial here involved, the warning flags were flying, for Mississippi to note and heed. What clearer signal had to be given to that state that its statutory policy of barring women from jury service was out of step with national policy and required modernization? Yet Mississippi did not amend its statute so as to permit women to serve on its juries until 1968, after Mrs. Pendergraft had been tried a second time for the murder of her husband before an all-male jury, under an indictment returned by an all-male grand jury in 1965. Both at the time of indictment and both trials, Section 1762 of the Mississippi Code of 1942 expressly limited competent jurors to male citizens.

The facts of this case do not present a retroactivity problem at all, when existing precedents are carefully analyzed. Between 1961 and the time of Mrs. Pendergraft's indictment in 1965, and beyond all peradventure before the second trial before an all-male jury in 1967, resulting in the sentence permitted by the majority to stand, Mississippi had ample opportunity to eliminate the statutory exclusion of women from jury service. Failure by that state to take timely and appropriate action deprived Mrs. Pendergraft of her federal constitutional rights to equal protection of the laws and to due process of law, guaranteed to her by Amendment XIV to the Constitution of the United States. These rights were in existence and were known to be in existence for many years before she was indicted and tried. It is extremely unfortunate that the false issue of retroactivity vel non is allowed to muddy the majority's consideration of what is really a simple question.

I respectfully dissent from the reversal of the main appeal.

APPENDIX B

Mrs. Catherine T. PENDERGRAFT, Plaintiff,

v.

Tom D. COOK, Superintendent, Mississippi State Penitentiary, Defendant.

Civ. A. No. 4499.

United States District Court, S. D. Mississippi, Jackson Division.

Feb. 23, 1971.

Supplemental Opinion March 2, 1971.

Petition for habeas corpus by state prisoner. The United States District Court for the Southern District of Mississippi, Dan M. Russell, Jr., J., issued the writ, but the Court of Appeals remanded the case, 433 F.2d 969. On remand, the District Court held that upon observance of officers, who were called to residence of petitioner and her husband, of body of husband in rigor mortis, and upon their awareness that petitioner had been at home alone with deceased throughout the afternoon and evening, officers had "probable cause for arrest" of petitioner which was independent of search conducted by the officers, so that ensuing search was necessary for preservation of evidence and was thus valid.

Order accordingly.

1. Searches and Seizures Key 7(28)

There can be no consent to a search where party allegedly consenting was in a dazed condition due to alcohol, drugs or shock.

2. Arrest Key 63(4)

When constitutional validity of an arrest by state officials arises on an application for a writ of habeas corpus, federal constitutional standards alone establish the test, and it is function of federal court to determine whether facts available to officers at moment of arrest would warrant a man of reasonable caution in the belief that an offense has been committed.

3. Arrest Key 63(4)

A hunch does not constitute "probable cause for arrest."

See publication Words and Phrases for other judicial constructions and definitions.

4. Arrest Key 63(4)

Searches and Seizures Key 3.3(1)

Upon observance of officers, who were called to residence of petitioner and her husband, of body of husband in rigor mortis, and upon their awareness that petitioner had been at home alone with deceased throughout the afternoon and evening, officers had "probable cause for arrest" of petitioner which was independent of search conducted by the officers, so that ensuing search was necessary for preservation of evidence and was thus valid.

Weaver E. Gore, Jr., Jackson, Miss., for plaintiff.

A. F. Summer, Atty. Gen., Guy Rogers, Asst. Atty. Gen., Jackson, Miss., for defendant.

OPINION OF THE COURT

RUSSELL, District Judge.

This cause is before the Court for the second time, having been remanded by the Fifth Circuit Court of Appeals

in Cause No. 29229, October 29, 1970, 433 F.2d 969, with directions for this Court to pass on the issue of whether petitioner's state court trial was invalid by reason of the alleged admission of illegal evidence against her in violation of her constitutional rights.

By way of background, petitioner, Mrs. Catherine T. Pendergraft of Jackson, Mississippi, was convicted in the First Judicial District of Hinds County, Mississippi of the murder of her husband, Ralph N. Pendergraft. Her first conviction was reversed by the Mississippi Supreme Court and the cause remanded for a new trial as reflected in Pendergraft v. State, 191 So. 2d 830, rendered November 7, 1966. That court primarily found reversible error in the trial court's denial to petitioner of the right to consult with counsel during a two hour recess. The state appellate court also pointed out other errors, among them that a judicial determination, in the absence of the jury, should have been made as to whether probable cause existed for the arrest of Mrs. Pendergraft at the time a search was made of the residence. In its opinion the Court summarized that Jackson police officers, on the night of August 26, 1965, in the course of their investigation of an obviously violent death, without benefit of a search warrant, and, prior to petitioner's formal arrest the next day following an autopsy, picked up several articles, which were subsequently exhibited in the trial against petitioner. The Court, in relating the facts upon which it found that the officers were lawfully upon the premises, said that the officers conversed briefly with the accused's physician and then went to the family room where the nude body of the deceased lay on the floor covered by a bedspread. Their investigation revealed the body to be cold and stiff with seventeen visible wounds thereon. No blood or blood stains were beneath the body and the body itself appeared to have been cleaned with the exception of blood found under the fingernails and on the bottom of the feet. An

investigation of the premises disclosed traces of blood on the floor of the kitchen and in the hallway. Blood was found on the doorway to the bar adjoining the family room, and a blood stained bottle and glass were found in the bar. Further investigation led to the utility room where the officers noticed the clothes dryer to be warm, and upon opening it found articles of clothing, towels and other items therein. A sponge and pillowslip were found elsewhere in the home. The Court, in finding that the officers were lawfully upon the premises, held that they could testify to that which came under their observation, but that the greater question was whether they had the right in the course of their investigation to open the bar area and to open the dryer without a search warrant and without arrest. The Court further held that the question should have been resolved by a judicial determination of whether there was probable cause for the arrest of petitioner contemporaneous with such a search. The lack of this determination was thus one of the grounds for reversal.

Preceding the second trial and conviction, petitioner filed a motion to suppress certain evidence, contending that various articles were examined and taken by police officers from the Pendergraft residence on the night of August 26, 1965, prior to her arrest the following day, and other articles were seized and impounded on the following day under an illegal search warrant, which warrant had not been placed in evidence in the first trial, and that both searches and seizures were illegal. After a full, evidentiary hearing, the trial judge issued his written opinion on the motion finding that only certain of the articles introduced in the first trial were impounded by police officers on the night of August 26, 1965, and that the remaining articles were seized the next day following the arrest and issuance of a search warrant. As to those articles taken on the night of August 26, 1965, and ad-

dressing himself to the ruling of the Mississippi Supreme Court with respect to probable cause, the trial judge, after referring to the testimony of police officers and that of petitioner relating to the initial investigation on the night of August 26, 1965, found that the officers had probable cause to believe that a felony had been committed and reasonable grounds to believe that petitioner committed the felony. He accordingly overruled that part of the motion relating to the items seized on the night of August 26, 1965, and specified that the following items could be used as evidence by the state: (1) a band aid from underneath the deceased's body; (2) a bottle of scotch and glass with blood stains; (3) two knives obtained in the kitchen; (4) a pillowslip with blood thereon; (5) a yellow sponge found on the floor; and (6) the bedspread covering the deceased's body. As to the search warrant, although it specifically itemized all other articles which were seized under it, the trial judge found that the affidavit on which the search warrant was issued was defective and therefore the search warrant was void. The judge accordingly sustained the motion to suppress as to all evidence seized under the illegal warrant. That evidence, including the items found in the clothes dryer, was not offered at the second trial and is, of course, not an issue here.

As to the second conviction, affirmed by the Mississippi Supreme Court on July 8, 1968, its decision appearing in 213 So.2d 560, and which is under attack here, the Court again related the facts pertaining to the death of Pendergraft. The Court stated that on the afternoon of August 26, 1965, the deceased suffered seventeen stab wounds while alone with his wife, petitioner here, in their home in Jackson, Mississippi. About 7:30 p.m., petitioner telephoned her former brother-in-law, Grady Tucker, asking him and his wife to come to her home immediately as something had happened to Ralph. Mrs. Tucker called Dr. W. B. Tumlinson, petitioner's physician, who arrived

at the Pendergraft home shortly after the Tuckers. Dr. Tumlinson called the Hinds County Coroner, who in turn called the Jackson Police Department. Two detectives were dispatched to the home in response to this call. They found the nude body, as they had previously testified, covered by a pink bedspread, lying on the floor in the family room. Dr. Tumlinson, the coroner and the detectives examined the wounds which "ranged from six puncture type wounds behind the right ear, downward to a gaping wound in his right chest, one in his right abdomen, four recent cuts just above his right knee, and numerous other cuts in the palms of his hands, the webbing between the fingers and on the outside of the fingers. All of these appeared to be shallow cuts except the ones in his chest and abdomen. His body had been completely cleaned, and there was no evidence of blood except on the sole of his right foot, on the bottom of the left big toe and around the cuticles of his fingernails." Continuing the Court said: "The detectives found a bloodstain on the doorknob of a louvered door opening from the family room to an enclosed bar. On the counter of the bar they found a partially filled bottle of scotch whiskey and a whiskey glass, both of which had bloodstains on them. The kitchen adjoins the family room, and on one counter of the kitchen the detectives found a butcher knife with bloodstains on the stainless steel blade, and on another counter near the sink they found a butcher knife that had been washed and was still wet. They found a pillowslip with a bloodstain on it on a bed in a small bedroom connected with the breakfast room. When the body was turned over, a bandaid was found underneath the body. All of these items, together with the pink bedspread which partially covered the body, were received as exhibits. All of these items were recovered on the night of August 26, while the detectives were investigating the killing and before the appellant was formally arrested on August 27."

The Court further found that when Grady Tucker arrived, he turned the clothes dryer off at the request of the petitioner and that, during the course of their investigation, the detectives discovered the dryer still warm with the items of clothing and towels in it. These were primarily the items picked up the next day under a search warrant after petitioner had been formally arrested. The Court affirmed the trial court's refusal to allow the contents of the dryer to be introduced in evidence, and affirmed the trial court's finding that the detectives had probable cause to arrest petitioner with the consequent proper admission of the articles picked up in their initial investigation which occurred on the night of August 26, adding this: "These detectives would have been derelict in their duty if they had not been alert and observant in investigating a death which bore every indication of having been violently inflicted by the only other person present, namely, Mrs. Catherine Pendergraft; they would have been derelict in their duty if they had not followed up every lead they ran across."

As to why petitioner was not then and there arrested and booked, the appellate court stated that the doctors, the detectives and other witnesses testified that petitioner talked with a thick tongue and appeared to be under the influence of alcohol or drugs; that she was in a precarious mental, physical and emotional condition. There were numerous phone calls between Dr. Tumlinson and the district attorney, the coroner and the district attorney, and one of the detectives and the district attorney. Her doctor was unable to find a hospital room for her. After this enumeration, the appellate court said:

"It follows quite logically that the only reason the appellant was not arrested that very night was because all parties were concerned about her doubtful condition; there certainly was probable cause to suspect her. The appel-

lant was alone with her husband in their home when he was fatally wounded and when he was stabbed seventeen times. She never denied that she had done the stabbing; she said that he attacked her and she acted in self defense."

The Court continued:

"The items were found and taken from the immediate vicinity of the body or from the rooms adjoining the family room where the body itself was found. These articles were properly admitted into evidence."

On July 15, 1969, petitioner filed her application for a writ of habeas corpus in this Court setting forth that she was first tried on December 8, 1965, and convicted; this conviction was reversed and the cause remanded, 191 So.2d 830; she was tried and convicted again on January 9, 1967; this conviction was affirmed on July 8, 1968, 213 So.2d 560;[1] on her appeal to the United States Supreme Court, that court, on April 21, 1969, denied jurisdiction, if an appeal, and, if a petition for certiorari, denied certiorari, 394 U.S. 715, 89 S.Ct. 1453, 22 L.Ed.2d 671. A petition for a rehearing was denied by the U. S. Supreme Court on June 2, 1969, 395 U.S. 941, 89 S.Ct. 1993, 23 L.Ed.2d 459. She filed a petition for leave to file a writ of error coram nobis in the State Supreme Court, and on July 7, 1969, it was denied. The respondent conceded that petitioner had exhausted her state remedies, and that at every stage of her litigation she had protested the exclusion of women from both the grand and petit jurors which convicted her and the introduction into evidence of the fruits of an alleged illegal search, being the two grounds urged upon this Court.

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[1] The Court notes her motion for a rehearing was denied on July 8, 1968.

By stipulation, the parties agreed that the official record of her second state court trial, or any portion thereof could be introduced into evidence, and further stipulated that the evidence relied on by petitioner as the fruits of an illegal search consisted of a whiskey bottle, glass and pillowslip containing blood stains. Attached to the stipulation but not referred to therein was a floor plan of the residence containing a legend of where, but not when, certain articles were seized.

The matter was submitted to this Court on the pleadings, the stipulation, only that portion of the record pertaining to the hearing on the motion to suppress, and briefs. In the absence of a transcript of the record of the trial itself, showing which articles were in fact offered in evidence, and being of the opinion that petitioner's contention that she was deprived of a constitutional right in the total exclusion of women from both the grand jury which indicted her and the petit jury which tried her involved a controlling question of law, this Court confined its opinion to the jury issue only, finding in petitioner's favor.

By its remand, the Fifth Circuit Court of Appeals has now directed this Court to pass on the second ground of the petition, that is whether or not the evidence introduced into petitioner's second state trial was the result of an illegal search.

Toward the issue, the parties have offered a supplemental stipulation that (1) a transcript of the entire record of the trial in Cause No. 44,873 on the docket of the Mississippi Supreme Court together with exhibits, or any portion thereof, may be introduced; and (2) that all the hereafter listed items were seized as evidence by members of the Jackson Police Department on the night of August 26, 1965, in petitioner's home without a search warrant and without her being arrested or advised that she was suspected of killing her husband:

(a) One pillowslip with a blood spot thereon.

(b) One glass with bloodstain thereon.

(c) One scotch whiskey bottle.

(d) One butcher knife with bloodstain on its handle.

(e) One butcher knife with water spots on its blade.

(f) One sponge with blood spot thereon.

(g) One bedspread with blood spot thereon.

Petitioner has submitted to the Court for the first time the entire transcript of her second trial and conviction including a transcript of the pre-trial hearing on the motion to suppress, all of which the Court has carefully considered along with the pleadings, stipulations and exhibits thereto, and briefs.

Supplementing the facts found by the Mississippi Supreme Court, this Court finds that the trial record reveals that the wounds inflicted on the deceased occurred in the early afternoon of August 26, 1965, at a time when the deceased and petitioner were alone in the residence. Other than petitioner's saying that she took a pill and went to sleep, the record is silent as to what happened from then until petitioner, at about 7:30 p.m., telephoned the Tuckers to come to the residence. One or the other of the Tuckers called Dr. Tumlinson, petitioner's physician, who arrived at the home around 8 p. m., or after, shortly before Tucker, his wife, and three other people with the Tuckers got there. Dr. Tumlinson called the coroner who came to the residence and who then called the Jackson Police Department. Detective Sergeants J. L. Black and S. M. Magee responded. They arrived at 9:20 p.m. Persons who remained on the premises besides petitioner, were Dr. Tumlinson, and the Tuckers. The police officers examined the body in the presence of Dr. Tumlinson, who probed the wounds and

offered the opinion that none was fatal. The coroner arrived, and he, too, in the presence of Dr. Tumlinson examined the body. In detailing the search of the premises, the responses of the officers at various times during the trial, and particularly when read out of context, might infer that various items were picked up before the officers' attention focused on petitioner. However, in trying to determine the exact sequence of events following the examination of the body, the district attorney directed this question to Sergeant Black: "Then you had been in the house about an hour, then, before you actually conferred with Mrs. Pendergraft, according to your testimony?" His answer was: "No, sir I wouldn't think it was an hour before we conferred *to* (sic) her. Only after the examination of the body and it was determined by her and by Dr. Tumlinson that no one else was there, I asked Mrs. Pendergraft what had happened, or could she tell me what had happened." Other than the band aid and spread covering the body, immediately observable to the police, the investigation then revealed traces of blood on the floor of the family room where the body lay and on the door knob on the louvered door leading to the bar, only a few feet from deceased's head. On opening this door, the blood-smeared bottle and glass were evident. Sergeant Black stated that at one time, Mrs. Pendergraft was seated in a chair next to the open doorway leading from the family room to the kitchen, and that when he went over to talk to her he noticed in clear view the bloodstained butcher knife on the kitchen counter, and the knife with drops of water still clinging to it hanging in a rack by the sink. One of the Tuckers directed his attention to the dryer in the utility room adjoining the kitchen, which was warm to his touch, and to the bloodspotted pillowslip lying on a bed in a back room designated on the plat as an office. During the course of the evening, and while the inquest was taking place, Black testified that petitioner wandered from room to

room, and at one point when she was in the master bedroom he noticed a sponge on the floor of a room on his way to see her.

In the opinion of this Court, the validity of the search hangs on the determination of whether the search led to the eventual arrest, or whether probable cause for arrest existed before the search. Bailey v. United States, 128 U.S.App.D.C. 354, 389 F.2d 305.

As to why petitioner was not immediately arrested prior to or incident to picking up those articles not under the immediate observation of the police, the district attorney, as reflected in the transcript of the hearing on the motion to suppress, attempted to show that due to petitioner's physical and mental condition and the lack of a hospital room, petitioner's arrest was humanely delayed to the next day, yet she nonetheless was in protective custody. He attempted to do this by questioning petitioner's doctor, one of the detectives, and the coroner as to various telephone conversations had between them and himself as to what should be done with her that night. As these conversations took place outside the presence of petitioner, they were ruled inadmissible, only the inference of his attempt remaining. He then offered to testify himself, but objections to his taking the stand were sustained.

[1] The district attorney also attempted to show that petitioner consented to the search. Officer Black, under direct examination, stated that petitioner was cooperative with the police and made no objection to the search of the residence and examination of various articles. Petitioner denied the truth of this statement. Be that as it may, all witnesses were agreed that petitioner was in a dazed condition, from drugs, alcohol or shock. There can be no consent to a search under these circumstances. United States v. Moody, D.C., 311 F. Supp. 756. Similarly, it is doubtful that her feelings could be properly analyzed to test

whether or not she was aware of being in custody, such awareness being a factor to consider in determining whether an arrest had been made. United States v. Cortez, 6 Cir., 425 F.2d 453; and United States v. Grandi, 2 Cir., 424 F.2d 399. Nonetheless such a determination is unnecessary for, as shown by its stipulation, the state admits no arrest was made. It remains, then, that the legality of the search must be tested in relation to probable cause for arrest.

"A search is not to be made legal by what it turns up." United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L. Ed. 210. Similarly an arrest is not valid if made without probable cause. In the absence of an arrest, the issue here is whether or not probable cause alone can validate a warrantless search. It apparently can if the results of the search do not determine probable cause.

[2, 3] Under Mississippi law, a police officer without a warrant may arrest a person when he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person committed it. Lathers v. United States, 5 Cir., 396 F.2d 524, 525. There is no question in this case but that Officers Black and Magee had authority to arrest petitioner. This is determined by Section 2470 of the Mississippi Code of 1942. However, when the constitutional validity of an arrest by a state official arises on an application for a writ of habeas corpus, federal constitutional standards alone establish the test. Paige v. Potts, 5 Cir., 354 F.2d 212. It is the function of the federal court to determine whether the facts available to the officers at the moment of arrest would "warrant a man of reasonable caution in the belief" that an offense had been committed. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543. A hunch does not constitute probable cause. At the other extreme neither is probability a certainty or a conclusion beyond a reasonable doubt. Lathers v. United States, supra.

[4] This Court agrees with the finding of the state supreme court that probable cause existed for the arrest of petitioner, but this of itself does not validate the search. The cause for arrest must exist independent of the search. Upon the officers' observance of the body in rigor mortis and upon their awareness that petitioner had been at home alone with the deceased throughout the afternoon and evening, they had probable cause for arrest. In the obvious fact that, when they arrived, efforts had been made to clean the body, traces of blood being present on the floor and nearby door knobs, and because of the numbers of people in and out of the premises, their efforts to gather and preserve evidence were permissible. This Court agrees that the detectives would have been derelict in their duty if they had not been alert and observant in investigating a death which bore every indication of having been violently inflicted.

If any search were valid, petitioner contends that this search was too broad in its range, relying heavily on the limited search permitted under the holding in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685. Although the Supreme Court in a later case, Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409, refrained from expressing an opinion as to whether Chimel should be applied retroactively, the Fifth Circuit Court of Appeals has refused to give it retroactive effect. United States v. Bankston, 5 Cir., 424 F.2d 714, and Lyon v. United States, 5 Cir., 416 F.2d 91. The search involved here occurred before the decision in Chimel, and under United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653, would have been permissible. The Fourth Amendment prohibition against warrantless searches is well established. The "exceptional circumstances" which may validate a search without a warrant were listed in the Vale decision. This Court notes that all the cases cited therein as well as those immediately above treat of

searches "incident to an arrest." For them to be applicable to the present case means that "incident to an arrest" must be equated with probable cause. An informative treatment of this point is found in United States v. Gorman, 2 Cir., 355 F.2d 151, cited with approval in Bailey v. United States, supra. In Gorman, at pages 159 and 160, the Court pondered the circumstances of a case in which probable cause was found in support of a search made prior to an arrest:

> "If we were to hold that Roche did not consent, we would be obliged to consider another basis for supporting the search. The argument would be that when a suspect is available for immediate arrest at the place of the search, to which the police have lawfully gained access, and reasonable cause for his arrest exists, a search of personal effects without a warrant is reasonable even though arrest is postponed. The record furnishes the necessary premise. The combination of facts known to the agents—Gorman's admission to having an accomplice. Gorman's and Roche's common use of the Connor-Noel cover, Roche's disclaimer of knowledge of a person in his company answering Gorman's description, and the telephone calls from Gorman to Roche's room in the Holiday Inn—would together have constituted reasonable cause for arresting Roche prior to the search of his luggage; each fact augmented the probative force of the others. Cf. United States v. Monica, 295 F.2d 400, 401-402 (2 Cir. 1961), cert. denied, 368 U.S. 953, 82 S.Ct. 395, 7 L.Ed.2d 386 (1962).

"No Supreme Court decision speaks directly to the point. Husty v. United States, 282 U.S. 694, 700, 51 S.Ct. 240, 75 L.Ed. 629 (1931), which would seem to sanction such a search, may rest on special considerations applicable to moving vehicles. Johnson v. United States, 333 U.S.

10, 15-17, 68 S.Ct. 367, 92 L.Ed. 436 (1948), and Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959), which might appear at first blush to look the other way, are fairly distinguishable—Johnson on the ground that the arresting officer had no 'valid basis in law' for his intrusion into the defendant's room. 333 U.S. at 16-17, 68 S.Ct. 367, and Henry on the point that no reasonable grounds existed for the arrest, conceded and held to have occurred when the car was stopped. 361 U.S. at 103, 80 S.Ct. 168. Contrast Rios v. United States, 364 U.S. 253, 262, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960). Indeed, Ker v. State of California, 374 U.S. 23, 43, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963) (opinion of Mr. Justice Clark,' indicates the question to be open. We have likewise found no controlling decision in this circuit. Mr. Justice Traynor's well-known opinion in People v. Simon, 45 Cal.2d 645, 648, 290 P.2d 531, 533 (1955), would sustain the validity of such a search, see also Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36 (1956); and Mosco v. United States, 301 F.2d 180, 188 (9 Cir.), cert. denied [Hansen v. United States], 371 U.S. 842, 83 S. Ct. 72, 9 L.Ed.2d 78 (1962), is not to the contrary in the circumstances here presented. Compare United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951). Lee v. United States, 98 U.S.App.D.C. 97, 232 F.2d 354 (1956), may be distinguishable, like Johnson, on the basis of unlawful entry by the police, and would not bind us in any event. We do not understand just what values would be served by a rule that would force the police to impose a justifiable restraint on the person as a condition to making a search which, if fruitless, might cause them to decide against it; on the other hand, if the search does lead them to make an arrest for which reasonable cause previously existed, the search would seem 'incident to arrest,' United States v. Rabinowitz, 339 U.S. 56, 60, 70 S.Ct. 430, 94 L.Ed. 653 (1950), in any normal use of language, and the dilemma of seeking 'to justify the

arrest by the search and at the same time to justify the search by the arrest,' Johnson v. United States, supra, 333 U.S. at 16-17, 68 S.Ct. at 370, is obviously not presented. Since, however, the alternative basis here considered has not been argued by the Government, we rest our decision on what we consider the sufficient ground of consent and leave determination of this issue for another day."

In Bailey, Judge J. Skelly Wright, held: "Even if the formal arrest was not made until after the search, the search will be upheld so long as there is probable cause for an arrest before the search is begun." The Gorman case was cited as authority. Later in his opinion, Judge Wright quoted from McDonald v. United States, 335 U.S. 451, 459, 69 S. Ct. 191, 93 L.Ed. 153: "The 'exigencies of the situation made (the police) course (of action) imperative.'"

Under the reasoning of the Gorman decision and applying it and Bailey to the present case this Court finds that independent of the search there was probable cause to arrest petitioner and that the ensuing search was valid and necessary for the preservation of evidence, an exigency or special situation recognized in Vale.

Otherwise, the Court re-affirms its earlier decision that petitioner is entitled to be indicted and tried by juries from which women have not been excluded, particularly in view of her alleged plea of self-defense.

An order may be submitted granting the writ of habeas corpus, except that petitioner shall remain at her present place of confinement without bail, until the appropriate state officials determine within a reasonable time whether or not to seek her re-indictment and another trial.

SUPPLEMENTAL OPINION

In its recent opinion of February 22, 1971, upholding the validity of the search, on which no order has been entered, this Court in effect found that the application for a writ of habeas corpus should be denied on the issue remanded to it in the decision of the Fifth Circuit Court of Appeals, Pendergraft v. Cook, 433 F.2d 969. However, in clinging to its former opinion, before the remand, that petitioner was entitled to be indicted and tried by juries from which women had not been excluded, this Court is faced with the anomalous position of granting the writ on an issue the Appellate Court refrained from ruling on. As its aforesaid opinion stands today, the Court finds that it has placed a burden on the respondent to determine whether or not to effect an appeal, whereas the burden should be on petitioner who has raised the issues. Accordingly, the Court finds that the granting of the writ of habeas corpus should be stayed pending an appeal of the Court's opinion of February 22, 1971, as this day supplemented.

The Court will draw its own order.